

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1249

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

BARTHOLOMEW BUIGUES, ANGELO PUIG,
IRMA ANES, SUSAN HOROWITZ and
JOHN SAMMARCO,

Defendants-Appellants.

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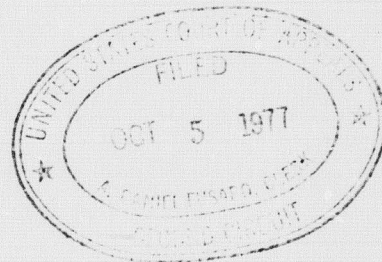
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Docket No. 77-1249
77-1252
77-1253

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REPLY BRIEF FOR APPELLANT SUSAN HOROWITZ



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AUTHORITIES CITED

Cases:

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REPLY BRIEF FOR APPELLANT SUSAN HOROWITZ

Preliminary Statement

This is a brief in reply to the brief of Appellee
United States of America and in support of the appeal of
Susan Horowitz.

The Government's Position

The government's brief fails to demonstrate that the evidence adduced at trial, which was admitted against Susan Horowitz, is sufficient to support her conviction.

The government asserts that Miss Horowitz did not perform a job for Youth In Government. It bases its case upon the following facts it asserts were proved by the evidence introduced at trial. One, that Miss Horowitz did not come to the storefront office of Youth In Government during the period she was employed. Two, that she did no supervising. Three, that the Department of Agriculture notified Youth In Government that the orange juice containers used by its vendor were defective and it took a "substantial" period of time for that defect to be remedied. Finally, Miss Horowitz had a second job during part of the period of time she was working with Youth In Government and that, in applying for that job, she said she was available for immediate employment.

The uncontroverted facts adduced at trial indicate that none of these facts can reasonably serve as a basis for her conviction. Indeed, a fair reading of the testimony indicates that the decision of the jury in this instance was unjust.

ARGUMENT

Miss Horowitz' Failure To Come To The Office And "Supervise"

The testimony presented by the government through two witnesses who stated that they did not see Miss Horowitz come to the Youth In Government office is irrelevant. The trial testimony is clear that she was not supposed to come to the Youth In Government offices. There was no testimony presented to show that this was her duty. Instead, the record is replete with evidence that she was supposed to go to the vendor and insure that the lunches were properly prepared and distributed (724, 725, 802, 803, 850). And the uncontroverted testimony shows that this is exactly what she did (637). In essence, the testimony of the government's witnesses raises a strawman, the slaying of which is improperly used to support her conviction.

The government's next argument that Miss Horowitz did no "supervising" is a similar illusion. She was never required to. Again, absolutely no evidence was presented showing that she was required to "supervise." She was told to go to the vendor's plant (802-803). She was required to "monitor" the preparation and distribution of the lunches. And she was paid as a monitor - like every other one (95). Finally, the government's allegation that Miss Horowitz was not needed at the vendor's is directly controverted by the unchallenged

evidence that every sponsor dealing with A.M. P.M. as a vendor sent a person to his plant to consult on the preparation and distribution of their lunches (636).

The Orange Juice Container Problem

The orange juice container problem provides even less support. The government asserts, by implication, that if it took a "substantial period of time" to correct the containers (1066), Miss Horowitz must not have been doing her job properly.* But is that a proper inference? No testimony was presented indicating if Miss Horowitz was informed of the problem, how long it took to inform her or that the problem, under any other circumstance, could have been corrected any quicker. Surely some evidence is necessary to show that this delay was not unreasonable. No such evidence is provided. Nor can it be said that Miss Horowitz had a duty to explain this problem. The evidence against Miss Horowitz in this respect, although surely known to the government long before trial, was presented only in rebuttal, thus leaving Miss Horowitz no opportunity to controvert it other than by cross-examination of the government employee who testified. Indeed, the person with direct knowledge of the problem, the vendor, was not questioned about it by the government when he testified.

*The testimony of the government's rebuttal witness, Andrews, in full on this issue is: "When, and if you know, was the problem corrected?" "I can't say exactly, but it was a considerable time after that."

Miss Horowitz' Other Job

The evidence is clear that in June, 1975, Miss Horowitz was unemployed. The evidence presented at trial, with respect to her application for a position at Arawak, while she was being considered for a summer job with Youth In Government, is the underpinning of the government's case. But can the fact that an unemployed person applied for two jobs at one time be used to support a conviction for an attempt to defraud the government? The plain fact is that anyone who is unemployed would be remiss in not following every suitable occupational lead, especially where one position is a permanent job paying \$12,000 a year, while the other is a temporary, summer job, paying \$880 with no future whatsoever. Obviously Miss Horowitz was ready to start immediately with Arawak when on June 16, 1975 she wrote her application. She was not employed by Youth In Government until after June 27, 1975 (GX 8).

Miss Horowitz' Knowledge

The government tries to stretch Ebeling v. United States, 248 F.2d 429 (8th Cir.), cert. denied, 355 U.S. 907 (1957) and United States v. Erb, 543 F.2d 438 (2nd Cir.), cert. denied, 429 U.S. 981 (1976) to encompass the factual context in this case. But this case goes far beyond the facts presented in those cases in imposing criminal liability. In Ebeling as stated in the

language quoted by the government (248 F.2d 435), the court rejected an appeal where the defendant knew that his claimed wages were directly reimbursed by the government. But here there is not only no evidence that Miss Horowitz knew that, there is no evidence that such was the case. The payments to Youth In Government were based upon the number of meals served not Miss Horowitz' salary.

Similarly in Erb, as the government recognizes* the defendant in that case, Mr. De Boer "had instructed his partners" to do certain acts which made him an aider and abettor. Where is comparable evidence in this case? The government has not shown that Miss Horowitz did anything remotely similar to instructing anyone at Youth In Government to file a false claim. The evidence is simply insufficient.

Miss Horowitz' Failure To Testify

The fact first mentioned by the government with respect to her in its brief and, therefore, presumably considered the most important, is that Miss Horowitz did not testify. A fair reading of the transcript makes it apparent why that decision was made. Obviously the government would have wished to cross-examine her on her personal relationship with the individual who mentioned the possibility to her that she might find a job with Youth In Government. That individual, a government employee, was available to the government as a witness. He was not presented.

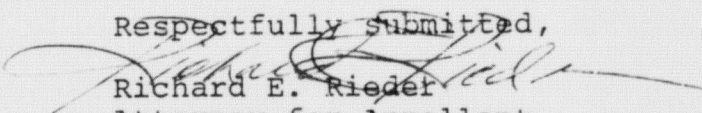
*Footnote**, p. 26 Brief of United States of America.

Obviously Miss Horowitz made a decision to not allow inquiry into her personal life. Whether that decision was right or wrong is not at issue. What is at issue is the government's innuendo that Miss Horowitz did not testify because she had something to hide. But nothing more is founded in our jurisprudence than the fact that a person is not required to testify against himself and no inference is to be drawn from that fact.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,


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